No. 91-1695

In The

Supreme Court of the United States

October Term, 1992

PIONEER INVESTMENT SERVICES, COMPANY,
Petitioner,

vs.

BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP, CLINTON ASSOCIATES LIMITED PARTNERSHIP, FT. OGLETHORPE ASSOCIATES LIMITED PARTNERSHIP and WEST KNOXVILLE ASSOCIATES LIMITED PARTNERSHIP,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Petitioner respectfully submits this Brief in reply to the Brief for Respondents.

ARGUMENT

I.

THE CIRCUMSTANCES UPON WHICH RESPONDENTS RELY TO ESTABLISH THEIR CLAIM OF EXCUSABLE NEGLECT ARE NEITHER UNIQUE NOR EXTRAORDINARY.

The circumstances upon which Respondents rely to establish their claim of excusable neglect, the disruption in Mr. Richards' practice and the content and placement of the deadline for the filing of proofs of claim,[1] are neither unique nor extraordinary.[2] Accordingly, Respondents cannot be allowed to file their proofs of claim late, regardless of which interpretation of excusable neglect this Court adopts.

Respondents would have this Court believe that their failure to timely file their proofs of claim in this case resulted from Mr. Richards' resignation from Meyerson & Kuhn. Respondents cite

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1. Brief for Respondents at 2, 3.

2. The courts that have considered the issue of excusable neglect under Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure ("Rule 9006(b)(1)"), unanimously hold that a movant relying upon excusable neglect must show circumstances that are unique or extraordinary. *In re Sasson Jeans*, 96 B.R. 457, 459 (Bankr. S.D.N.Y. 1989); *In re Chateaugy, et al.*, 104 B.R. 617, 619 (Bankr. S.D.N.Y. 1989). This requirement is consistent with the requirement imposed by courts that have considered the issue of excusable neglect under other rules containing the identical term. *650 Park Avenue Corp. v. McRae*, 836 F.2d 764, 767 (2d. Cir. 2d 1988); *Spound v. Mohasco Industries, Inc.*, 534 F.2d 404, 411 (1st Cir. 1976), *cert. denied*, 429 U.S. 886 (1976).

that Mr. Richards resigned effective July 31, 1989 (three days before the expiration of the Bar Date), and that Mr. Richards was denied access to his files until August 15, 1989 (twelve days after the expiration of the Bar Date), App. 56a, implying that Mr. Richards was aware of the Bar Date, and that he would have timely filed Respondents' proofs of claim if he had had access to his files.

The sworn statements of Mr. Richards establish, however, that Mr. Richards was not aware of the Bar Date at the time of his resignation. Mr. Richards swore, under oath, that he had no recollection of having seen the Notice for Meeting of Creditors, App. 29a, which fixed August 3, 1989 as the Bar Date, and that he had no recollection of ever having seen or been made aware of the Bar Date. App. 57a. If Mr. Richards was not even aware of the Bar Date at the time of his resignation, his failure to timely file Respondents' proofs of claim could not have resulted from his resignation.[3]

Moreover, the sworn statements of Respondents contradict Mr. Richards' sworn statements that he had not seen or been made aware of the Bar Date. Respondents allege that Mr. Richards reviewed the Notice for Meeting of Creditors, which fixed August 3, 1989 as the Bar Date, on June 12, 1989. App. at 143a. Respondents state unequivocally that on June 16, 1989, Mr. Richards assured Mr. Berlin that Respondents' proofs of claim would be prepared and filed "within a week". *Id.* Respondents' sworn statements establish that Mr. Richards either knew, or should have known, of the Bar Date, and that he planned to file Respondents' proofs of claim by June 23, 1989. If Mr. Richards

3. Mr. Richards' failure to timely file Respondents' proofs of claim likewise did not result from his lack of access to his files. If Mr. Richards was aware of the Bar Date, and prepared to file Respondents' proofs of claim, he easily could have obtained the duplicate file from Mr. Berlin. App. at 91a-92a.

had done this, then Respondents' proofs of claim would have been filed more than one month before Mr. Richards' resignation.

Regardless of whether one believes Mr. Richards' sworn statements or Respondents' sworn statements, it is clear that resigning from a law firm is not, as a matter of law, either a unique or an extraordinary circumstance. If Mr. Richards was aware of the Bar Date, which he should have been, and he knew that he would resign from Meyerson & Kuhn by July 31, 1989, then Mr. Richards easily could have made arrangements to timely file Respondents' proofs of claim prior to his resignation.

Respondents also rely upon the content and placement of the notice of the Bar Date in the Notice for meeting of Creditors.[4] The Court of Appeals for the Sixth Circuit did not suggest that the Bankruptcy Court was obligated to notify creditors in precisely the form set forth in Official Bankruptcy Form 16. App. 197a. Although Mr. Berlin had no knowledge of bankruptcy practice, App. 88a, he nevertheless is an attorney, a certified public accountant, and an experienced businessman. App. at 128a. It is reasonable to assume, therefore, that Mr. Berlin has the ability to read and to comprehend. Mr. Berlin received and read the Notice. App. 118a. The word "must" clearly is a word of mandatory effect.[5] Mr. Berlin knew, from an ordinary understanding of the English language, that creditors with claims scheduled as disputed, contingent, or unliquidated, and creditors with unlisted claims, were required to file a proof of claim. The Notice then cites to

4. The Notice provided, in pertinent part "You must file a proof of claim if your claim is scheduled as disputed, contingent or unliquidated, is unlisted or you do not agree with the amount. See 11 U.S.C. § 1111 and Bankruptcy Rule 3003." App. 29a.

5. *See, e.g.*, Webster's Ninth New Collegiate Dictionary 782 (1990) (definition of "must": "be commanded or requested to" ". . . be required by law, custom or moral conscience to . . .)".

specific sections of the Bankruptcy Code and Bankruptcy Rules. Immediately underneath this text appears "Bar Date is August 3, 1989". Bar clearly is understood by lawyers to mean exclude.[6] If Mr. Berlin did not know that the holders of claims specified in the Notice were required to file a proof of claim by August 3, 1989, then, at a minimum, he knew enough to at least ask his bankruptcy counsel what this meant.

Respondents state that "Mr. Richards himself did not recognize August 3, 'bar date' ". Brief for Respondents at 3. Respondents appear to imply that Richards read the Notice for Meeting of Creditors, and that he did not understand the significance of it. Respondents grossly mischaracterize Mr. Richards' sworn statements. Mr. Richards never stated that he did not recognize August 3 as a Bar Date; rather he only stated that he had no recollection of having seen the Notice for Meeting of Creditors. App. 57a. Mr. Richards reviewed Respondents' duplicate file on August 10, 1989. App. 144a. At that time, Mr. Richards obviously recognized August 3 as the Bar Date because he proceeded quickly to file Respondents' motion for an extension. It is clear, therefore, that Mr. Richards' failure to timely file Respondents' proofs of claim did not result from the content and the placement of the Notice.[7]

Petitioner respectfully submits that there are no facts in the record which show that Respondents' failure to timely file their proofs of claim resulted from circumstances that were either unique or extraordinary.

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6. *See, e.g.*, Webster's Ninth New Collegiate Dictionary 130 (1990) (definition of "bar": "to keep out; EXCLUDE").

7. Mr. Richards and Mr. Berlin easily could have verified that the Bar Date was August 3, 1989. Both of them were in Knoxville, Tennessee on June 16, 1989. If they had reviewed the files in the Office of the Clerk of the Bankruptcy Court, they would have seen the Docket Entry Cover Sheet, App. 24a, which stated "CLAIM DEADLINE: 08/03/89 . . .".

II.

EXCUSABLE NEGLECT FOCUSES SOLELY ON COUNSEL'S INADVERTENCE AND THE REASONS FOR IT. IT IS A STRICT STANDARD AND APPLIES ONLY TO EXTRAORDINARY CIRCUMSTANCES.

The plain language of Rule 9006(b)(1) allows relief only when the movant's *failure to act* is the result of excusable neglect.[8] The focus of Rule 9006(b)(1) is, therefore, on, and limited to, the reasons underlying the failure to act. *In re South Atlantic Financial Corporation*, 767 F.2d 814, 819 (11th Cir. 1985), *cert. denied sub nom. Biscayne 21 Condominium Associates, Inc. v. South Atlantic Financial Corp.*, 475 U.S. 1015 (1986). Accordingly, the only relevant inquiry is whether the failure to act resulted from neglect that is, under the circumstances presented, excusable.

Respondents cite the decision of the United States Court of Appeals for the Third Circuit (the "Third Circuit") in *Consolidated Freightways Corp. v. Larson*, 827 F.2d 916 (3rd Cir. 1987), *cert. denied sub nom. Consolidated Freightways Corp. v. Secretary of Transportation*, 484 U.S. 1032 (1988), for the proposition that errors within counsel's control *may* constitute excusable neglect. Brief for Respondents at 9, 10. While the court in *Larson* rejected a per se rule under Rule 4(a)(5), F.R.A.P., it nevertheless limited its inquiry to "the reasons underlying counsel's inadvertence." 827 F.2d at 919.

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8. Rule 9006(b)(1) provides in pertinent part, ". . . when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or order of the court, the court for cause shown may at any time in its discretion . . . (2) on motion made after the expiration of the specified period permit the act to be done where *the failure to act* was the result of excusable neglect." (Emphasis supplied.)

Respondents' reliance upon the decision in *Larson* is, however, clearly misplaced. First, the Third Circuit observed that "There is a qualitative distinction between inadvertence which occurs despite counsel's affirmative efforts to comply and inadvertence which results from counsel's lack of diligence". 827 F.2d at 919. Here, there was a total lack of diligence. Moreover, the Third Circuit required compliance with this threshold requirement, an affirmative effort to comply with the rule, before it would consider the factors that it found to be relevant to the analysis of excusable neglect. 827 F.2d at 921.

In *Larson*, the Third Circuit required a weighing and balancing of five factors, 827 F.2d at 919; however, each of the factors focuses solely on the reasons for the failure to act. To this extent, the decision in *Larson* is consistent with the decisions of other courts that limit the inquiry solely to the reasons for the failure to act. Contrary to Respondents' contention,[9] the decision in *Larson* does not consider "equitable factors".

Indeed, the application of the factors set forth in the decision in *Larson* to the facts of this case shows that the Third Circuit would have denied Respondents relief. The neglect in this case reflects professional incompetence such as ignorance of the rules of procedure. Richards failed to inform himself of how and when the Bar Date is fixed in cases in the Eastern District of Tennessee. Richards' neglect reflects an easily manufactured excuse incapable of verification by the court. Richards' claim that he was denied access to his files cannot easily be verified.[10] Richards failed to provide for a readily foreseeable consequence. If Richards' resignation was a real reason, which it is not, his failure

9. Brief for Respondents at 22.

10. As shown above, Richards' lack of access to his files did not cause him to fail to file Respondents' proofs of claim.

to arrange for the filing of Respondents' proofs of claim would not be excusable. The inadvertence in this case certainly reflects a complete lack of diligence. It is uncontroverted that Richards made no effort whatsoever to file Respondents' proofs of claim.[11] Finally, Richards' inadvertence did not result despite his substantial good faith effort to comply. On the contrary, Richards made no effort to comply with the Bar Date.

The other cases relied upon by Respondents, in arguing for a flexible standard of excusable neglect, clearly are distinguishable. The decision in *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corporation*, 843 F.2d 808 (4th Cir. 1988), is based on the holding that when a party is blameless, the negligence of the party's counsel is excusable. This decision is not good law in view of the decision of this Court in *Link v. Wabash Railroad*, 370 U.S. 626 (1962), which holds that in our representative system of litigation, the client always is bound by the omissions of his counsel and cannot avoid them. *Id.* at 633-634.

The decision in *Livingston Powdered Metal, Inc. v. NLRB*, 669 F.2d 133 (3rd Cir. 1982) clearly is inapposite. The standard at issue was not excusable neglect, it was "good cause" under rules promulgated by the National Labor Relations Board pursuant to the National Labor Relations Act. The case does not discuss "excusable neglect" under any rule of procedure which governs practice in courts of the United States.

In *Dominick v. Hess Oil V.I. Corp.*, 841 F.2d 513 (3rd Cir. 1988), the Third Circuit held that relief would not be granted under Rule 6(b) of the Federal Rules of Civil Procedure, for failure to timely serve a summons and complaint, if there was a lack of

11. Further, Richards was more than negligent, he was indifferent. App. 172a.

diligence or inadvertence by counsel leading to delay. 841 F.2d at 516. Here, the record shows that Richards' lack of diligence, inadvertence, and indiffference caused the delay.

The decision in *In re Four Seasons Securities Law Litigation*, 493 F.2d 1288 (10th Cir. 1974), to the extent it considers lack of prejudice, is incorrectly decided because lack of prejudice and other "equitable factors" are not relevant to the inquiry of whether the *failure to act is the result of excusable neglect. See In re South Atlantic Financial Corp., supra,* 767 F.2d at 818, 819.

III.

CONTRARY TO RESPONDENTS' CONTENTION, THE AUTHORITIES CITED BY PETITIONER DISTINGUISH CHAPTER 11 FROM CHAPTER 7 AND RECOGNIZE THAT THERE IS LIMITED DISCRETION TO GRANT EXTENSIONS OF TIME TO FILE PROOFS OF CLAIM LATE PROVIDED THAT EXCUSABLE NEGLECT IS ESTABLISHED UNDER RULE 9006(b)(1).

Respondents boldly state that the cases upon which Petitioner relies "are not well-reasonsed". Brief For Respondents at 16. Respondents argue that the analysis in these cases relies upon decisions that do not permit late, discretionary extensions of time for excusable neglect. A close reading of each of these cases shows that the courts were aware of the difference between the deadline for the filing of a proof of claim in a chapter 11 reorganization case and the deadline for the filing of a proof of claim in a chapter 7 liquidation case, and that they did not permit late, discretionary extentions of time because they concluded, correctly, that even under Rule 9006(b)(1), "equitable factors" cannot, and should not, be considered.

Respondents devote most of their discussion to the decision of the Third Circuit in *In re Vertientes, Ltd.*, 845 F.2d 57 (3rd Cir.

1988). Brief for Respondents' at 16-18. The Third Circuit did not, contrary to Respondents' contention, rely upon cases decided under statutes providing for no extension of time in reaching its conclusion that a court does not have discretion to grant an extension simply because no prejudice would result, or for any other equitable reason.

The court in *Vertientes* stated that "the old Rule did not allow any such extensions 'for cause shown' ". 845 F.2d at 59. The court in referring to Rule 9006(b), then stated that "The current Rule is clearly different". *Id.* at 59. The court in *Vertientes* concluded "Therefore, under Rule 9006(b)(1), a bankruptcy court does have discretion to extend time to file a proof of claim, but only under the circumstances set forth in the two situations described in the Rule." *Id.* at 59. The court in *Vertientes* recognized that extensions of time could be granted; however, it concluded, correctly, that where the motion is made *after* the expiration of the prescribed time, the extension can be granted only "where failure to act was due to excusable neglect". Lack of prejudice and any other equitable considerations, simply are irrelevant to whether the failure to act was due to excusable neglect.

Respondents criticize the decision in *Hoos & Co. v. Dynamics Corp.*, 570 F.2d 433 (2nd Cir. 1978), because that case involved a rule that Respondents' claim "expressly excluded late extensions of time". Brief for Respondents at 18. While former Rule 11-33(b)(2) contained a non-discretionary deadline, it is not accurate to say, as Respondents do, that the court was without discretion to extend the deadline. In *Hoos*, the Second Circuit specifically referred to Rule 906(b), the predecessor to Rule 9006(b)(1). However, because no action was taken within thirty days after the notice of confirmation, the rule was not applied. 570 F.2d at 439.

The cases upon which Petitioner relies clearly recognize that there is limited discretion to grant an extension of the deadline for

the filing of a proof of claim even after the expiration of the deadline. However, the extension must be sought, and can be granted *only* upon a showing of excusable neglect for *the failure to act*. Equitable factors, such as no prejudice to Petitioner, are not because of the plain language of Rule 9006(b)(1) relevant to this inquiry.

CONCLUSION

For the reasons stated in the Brief for Petitioner, and in this Reply Brief, Petitioner urges this Court to reverse the Court of Appeals and reinstate the judgment of the bankruptcy court in favor of Petitioner.

Respectfully submitted,

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